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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

TREVOR McCANDLESS

Before: Carswell LCJ, Nicholson LJ and Weatherup J

CARSWELL LCJ

[1] The applicant Trevor McCandless was tried at Belfast Crown Court in October 2001 before McCollum LJ and a jury for the murder of his wife Zara Elizabeth McCandless. The issue at trial was whether he should be found guilty of murder or of manslaughter, to which he had pleaded guilty, on the ground of provocation or diminished responsibility. The plea of guilty to manslaughter was not accepted by the Crown and the trial proceeded. On 26 October 2001 he was found guilty of murder and on 21 December 2001 the judge sentenced the applicant to imprisonment for life, ordering that the release provisions of the Life Sentences (Northern Ireland) Order 2001 should apply when he had served a term of fifteen years. He sought leave to appeal against conviction and sentence, but was refused leave by the single judge. At the hearing before us he renewed his application for leave to appeal against conviction, the issue of sentence being deferred.

[2] The applicant and his wife (to whom we shall refer in this judgment as Zara) had been married for some years, but following some difficulties in the marriage had separated for a few weeks. Zara continued to live in the matrimonial home 5 Riversdale Crescent, Coleraine, with their children, and the applicant was staying with his mother. He had been drinking during the afternoon and evening of 13 May 1999, and at some time in the early hours of 14 May he called at his mother's house but did not stay there. Instead he took his set of keys to 5 Riversdale Crescent and went to that house. He let himself

in through the garage, intending, according to his account given in evidence, to sleep in the family room next to the garage. Instead of staying in that room, however, he decided to go upstairs to look at the children, who were in bed asleep.

[3] Zara had seen or heard his approach to the house and telephoned the police at 4.30 am, asking them to come to the house and informing them that she and her husband were separated and that the applicant had just tried to break in. The applicant recounted in evidence that when he was upstairs Zara shouted "What are you doing here, you bastard?"

[4] The applicant then followed Zara downstairs, and, as he stated in his evidence, sat down in the dining room. He said that he wanted to stay and she would not agree. They got into a confrontation and Zara told the applicant to get out of the house. She went to telephone the police again, but the applicant pulled the telephone cord out of the wall. She dashed upstairs, apparently to use the extension telephone, but the applicant pulled out the plug of that instrument as well. He said in his evidence that when he came downstairs again she came dashing out of the kitchen with a red-handled knife in her hand. He engaged in a struggle with her and took the knife from her. At some stage he sustained a cut on the hand, which he attributed to this part of the encounter, although the pathologist expressed some doubt whether the particular laceration could have been caused by grabbing a knife blade. The applicant said that he recollected the knife falling on the ground, and professed to remember nothing more of the ensuing events until the police arrived.

[5] It was not in dispute that in the course of those events the applicant fatally stabbed Zara, inflicting a total of 33 or possibly 35 wounds. When the police arrived she was lying on the front path, covered in blood and with her nightshirt pulled up above her waist. There was no sign of life and she was pronounced dead by a doctor at 5.25 am.

[6] Neighbours who saw or heard parts of the episode gave evidence about the attack. Mrs Sharon Rankin stated that she saw the applicant standing in front of Zara, apparently holding her against her will. The witness ran outside and shouted at him "You're mad, you're fuckin mad, you bastard." Zara shouted to her to get the police and the ambulance. Mrs Rankin said that she saw the applicant raise his right hand, holding a carving knife, and stab his wife. She ran to call an ambulance and when she returned she heard him say "You'll not torment me again", whereupon he stuck the knife into Zara's side. She then saw Zara lying on the ground, while the applicant stabbed down at her a number of times, each blow making a squelching noise. Ms Lily McKinney saw Zara pressed tight against the wall, with blood on her, while the applicant had a knife in his hand. She said that the applicant stated to her "She pushed me over the edge."

[7] Mr Vincent McGuigan said that when he spoke to the applicant after the attack he said something like "I just lost it". He asked him what had happened or what had he done, to which the applicant replied to the effect that he did not know, he just went berserk. Mr Warnock Peters, an off-duty police officer said that the applicant asked him in a cool, collected manner "Is she dead?", then added "I just flipped" and said "Warnock, help me." When the police came the applicant said to them "It was me, I done it." He repeated remarks to the effect that he had "gone berserk" or "flipped". In the police station he asked the medical examiner for assistance to commit suicide. Because of this and his statement that he had been drinking heavily the doctor advised that interviewing be postponed.

[8] Forensic examination of the scene revealed a red knife handle in the roadway and a knife blade by Zara's body. When the police arrived the applicant had been holding the knife handle and a tea towel in his hand. A white-handled knife was in the kitchen sink. There were two knife blocks in the kitchen, containing a number of knives, from which five in all were missing. There were heavy bloodstains on the front path and the front wall of the house. There were more bloodstains inside the house, with some blood from Zara and some from the applicant on the mixer spout of the kitchen tap. It was difficult to piece together any coherent account of the course of the attack from the evidence available.

[9] In interview the applicant maintained that he could remember nothing about the incident after the point when Zara took out the knife. He said that when he got a rage in him he would have a blank, and that he had been in a rage because she would not sit and listen. He claimed that he had been so drunk that he could not bite his finger. He firmly denied that he had gone to the house with the intention of causing injury to her, claiming that he only wanted to talk to her.

[10] The defences raised on behalf of the applicant were lack of intention, provocation and diminished responsibility. Dr FWA Browne, a consultant forensic psychiatrist, was called to give evidence on his behalf. The jury rejected these defences and found the applicant guilty of murder.

[11] The applicant gave evidence in the terms which we have set out. In cross-examination at page 165 he stated, when asked to give an example of his "uncontrollable temper tantrums":

> "I would have slammed the doors, walked out, got into arguments, walked away from people, you know. If I got into an argument I would have left the room and, you know, slammed the door after me, that kind of thing."

Then at pages 169-70 the following exchange took place on the issue of his ability to control his temper:

> "**THE DEFENDANT**: I feel sometimes trapped as if you are in – and you are tied up and you can't get out of a situation and the only way is to slam a door and walk out, you know, that sort of way. But people misinterpreted that as uncontrollable temper. But since, as I say, me going to anger management and stress relaxation that, you see there, is another avenue to divert that, sir. Some people would count to ten, some people are more able to adapt to what's happening and what isn't.
>
> **LORD JUSTICE McCOLLUM**: I'm not trying to demur from – would you say you could restrain yourself from doing something really bad or not if you were in a temper?
>
> **THE DEFENDANT**: Well judging by the horrific act I would say no sir, what happened that night, but I … (INTERJECTION).
>
> **LORD JUSTICE McCOLLUM**: I mean, what are you saying?
>
> **THE DEFENDANT**: I don't know what made me do what I did that night, if you know what I'm trying to say, your Lordship, because I mean I have been in situations where a fight has occurred and walked away. I have been in situations where words have been exchanged and walked away from them. The person I was back in '85 isn't the person that I am now, sir, if you know what I am trying to say.
>
> **LORD JUSTICE McCOLLUM**: Well, I mean, are you saying really you are capable, even when you get angry or get into – you are capable of walking away?
>
> **THE DEFENDANT**: Yes I would have, yes.
>
> **LORD JUSTICE McCOLLUM**: Yes.

> **MR KERR**: Now I'm going to deal in more detail at a later stage with the full details of the killing, do you understand?
>
> **A.** Uh-huh.
>
> **Q.** But I want to ask you this, did Zara provoke you on the night of the killing?
>
> **A.** I can't answer that truthfully, sir. I can't remember, that's being honest."

Later in his cross-examination (at pages 237-8), however, Crown counsel asked the applicant the direct question "Do you say your wife provoked you?" and he replied (and repeated) "No."

[12] Dr Browne examined the applicant on four occasions between 12 June and 30 August 2001, the interviews totalling some seven hours in all. He also spoke to the applicant's brother Roy and studied the case papers. He had access to the prison medical records and the applicant's GP's notes and records. His medical history indicated a number of symptoms related to anxiety, depression and alcohol abuse. He had suffered from irritable bowel symptoms and alcoholic gastritis. There were a couple of entries describing uncontrollable temper at times, secondary to frustration. He complained at times of stress at work and of anxiety and feelings of anger, stress and irritability. In 1988 a question was raised whether he was suicidal. He regularly drank heavily, and around 1996-7 increased the frequency from week-end drinking to including weekdays. He sometimes drank alcohol in the mornings. He experienced alcohol-related shakes in the mornings, blackouts, sweating and craving for drink. He had a pattern of depression, involving difficulty in concentration, lack of energy and withdrawal from people. He said that he tended to bottle up his feelings and would deal with these by walking away from situations or going for a drink.

[13] Dr Browne said that the applicant had recounted to him his feelings of inadequacy, because Zara had a better job and that he felt a failure and that he had been letting her down. He started to feel insecure and concerned lest he might lose her. When the separation began a couple of weeks before the incident he could not accept that his relationship with his wife was over. He gave his account of Zara's death in an emotionally detached fashion.

[14] Dr Browne's conclusion was that the available information was consistent with the applicant's suffering from alcohol dependence syndrome, personality disorder and depression. He considered that his thoughts, feelings and behaviour were consistent with a diagnosis of dependent personality disorder and that he was suffering from that in 1998 as well as on

examination in 2001. Such a disorder, being a specific personality disorder, came within the classification system for mental disorders known as ICD10, the 10th edition of Natural Classifications of Diseases, published by the World Health Organisation:

> "(A) Specific Personality Disorder is a severe disturbance in the characteriological constitution and behavioural tendency of the individual, usually involving several areas of the personality and nearly always associated with considerable personal and social disruption."

It therefore constituted an abnormality of mind for the purposes of the statutory definition of diminished responsibility. He also suffered significant depressive symptoms, depression being an abnormality of mind.

[15] Dr Browne regarded the attack on Zara as being frenzied in nature. He was prepared to accept that the applicant's inability to remember the stabbing was genuine, being a phenomenon of psychogenic amnesia. He also considered that a person with his personal characteristics would be more likely to be provoked into losing his self-control and that his mental abnormalities would have diminished or reduced his ability to exercise self-control.

[16] Crown counsel cross-examined Dr Browne extensively and vigorously. He attacked his conclusions on the ground that they depended on examinations carried out a full three years after the incident and relied heavily on the accuracy and reliability of the applicant's own statements to him. On the issue of diminished responsibility counsel pressed the witness to agree that the applicant exhibited only bad, but not uncontrollable temper, and that his amnesia may not have been genuine. Dr Browne adhered to his opinion that the applicant suffered from an alcohol dependence syndrome. It may be noted, however, that the evidence did not suffice to satisfy the test for the disease of alcoholism accepted by the Court of Appeal in *R v Tandy* (1988) 87 Cr App R 45 at 51, that his drinking was involuntary, in the sense that he was unable to resist the impulse to drink.

[17] The grounds put forward by the applicant in his notice of appeal were the following:

> "1. The nature, timing, tone and extent of the Learned Trial Judge's frequent interventions in the cross examination of Dr Browne, Consultant Psychiatrist, failed to maintain the balance necessary to a fair trial.

2. In the circumstances where the prosecution and the court were possessed of a report commissioned by the prosecution, from Dr Fleming, which accepted the conclusions of Dr Browne as reasoned and reasonable, the Learned Trial Judge erred.

(a) in permitting the prosecution to embark on a cross-examination of Dr Browne, which included a root and branch and [sic] assault on his professionalism, methodology and conclusions, in circumstances where both the prosecution and the Learned Trial Judge knew no psychiatric expert evidence was going to be called in rebuttal.

(b) in refusing to permit the defence to re-examine Dr Browne about the existence and content of Dr Fleming's report.

3. The Learned Trial Judge's charge, taken as a whole, was so deficient, contradictory, unbalanced and of such a nature as to militate against a fair trial and a safe verdict, particularly having regard to the scale and range of speculation contained therein, the misdirection concerning intent, the nature of the direction on diminished responsibility and the prejudicial language deployed in respect of matters reflecting on the accused.

4. The Learned Trial Judge erred in law in failing to adequately direct the jury that manslaughter was the appropriate verdict in circumstances where collectively they found an absence of the requisite intent or that either the defences of diminished responsibility or provocation, or both, were made out.

5. The verdict is unsafe and against the weight of the evidence, particularly having regard to the uncontroverted defence evidence in support of

> diminished responsibility. The evidence was consistent only with a verdict of manslaughter."

At the hearing of the appeal his counsel did not pursue ground 4, and concentrated their argument largely on the first three grounds.

[18] We turn then to the first ground of appeal, that the judge intervened in the course of Dr Browne's evidence, which was vital for the defence, particularly on the issue of diminished responsibility, to an extent and in a manner which made the trial unfair. The applicant's counsel accused the judge of denigrating the witness's evidence and of subjecting him to unfair, confrontational and hostile interventionist questions and comments. If such a complaint were established, and we regarded the trial as unfair, it would violate a cardinal principle of justice and constitute a ground for setting aside the verdict as unsafe. It is necessary accordingly to examine the course of the witness's evidence in detail, an exercise which we have carried out with critical care.

[19] We have had occasion to examine the relevant area of law in two cases in recent years and have there set out the applicable principles, which we consider that we should set out again *in extenso.* In *R v Close* (1997), reported at [2000] NIJB 333n, we said at page 334:

> "The cardinal principle is that an accused person should receive a fair trial. Fairness is multi-faceted, and all the reported cases on the topic seem to us to constitute no more than examples of complaints of unfairness in the conduct of trials in one respect or another. One facet, not in point in the present case, is that if a judge makes comments in his summing-up which are so weighted against the defendant as to leave the jury little real choice other than to comply with the judge's views or wishes, this may make the verdict unsafe: see *Mears v R* (1993) 97 Cr App R 239 at 243, per Lord Lane. An analogous facet, which was the subject of the argument before us, is that the judge should not intervene to ask questions which would influence the thinking of the jury in a similar manner. None of the cases cited to us contained a clearly comparable example of such questioning, but we would accept a principle that if questioning by the judge were so weighted it might have the result of making the trial unfair and the verdict unsafe. The nearest example is *R v Gunning* (1980), reported as a note at 98 Cr App R 303, where the

> scale and quantity of interventions by the judge during the defendant's examination-in-chief deprived him of the opportunity to develop his evidence under the lead and guidance of his counsel. The gravamen of the complaint, as discussed by Cumming-Bruce LJ at 306, was that the judge gave the impression of having dismissed the defendant's evidence and turned the jury against the possibility of taking it seriously."

We returned to the subject in *R v Roulston* [2000] NIJB 329, where we said at pages 330-1:

> " … if a judge's interventions, whether in the form of questions or comment, so indicate his belief in the defendant's guilt that they may influence the thinking of a jury to such an extent that the decision is in effect taken out of their hands, a conviction may be unsafe: cf the remarks of Lord Parker CJ in *R v Hamilton* (1969, unreported), set out in the judgment of Lawton LJ in *R v Hulusi* (1973) 58 Cr App R 378 at 382. The principle is accurately and conveniently summarised in Valentine, *Criminal Law of Northern Ireland,* vol 1, Tab 6, p 11:
>
> > `The cardinal principle is that the defendant should receive a fair trial. He must not make remarks so weighted against him that the jury are left little real choice. If none by itself was unfair, the cumulative effect of the interventions must be judged in the context of the length of the trial and the strength of the evidence against the defendant.'
>
> That is not to say that the judge must preserve an unbroken silence until the end of a witness's evidence. As Rose LJ remarked in *R v Tuegel* [2000] 2 All ER 872 at 888-889:
>
> > `[I]t is of course trite law that a judge's role is to hold the ring fairly between prosecution and defence and this cannot be done properly if a

> judge enters into the arena by appearing to take one side or the other. Questioning which might suggest this should, therefore, be avoided. Often the best course will be for a judge to remain silent until counsel have had the opportunity to deal with the matter. But it is not only permissible for a judge, it is his duty to ask questions which clarify ambiguities in answers previously given or which identify the nature of the defence, if this is unclear. Such questions, particularly in a very long case, are most likely to help the jury and everyone else if they are asked at, or close to, the time when the ambiguity is first apparent. If a witness is in the box for many days, it would be contrary to good sense and the proper conduct of the trial to require the judge to save his questions until the end of the witness's evidence.'
>
> Most of the reported cases are concerned with interventions in a defendant's examination-in-chief which prevent his counsel from putting his narrative fairly before the jury, but application of the principle is not confined to such cases: see, eg, *R v Roncoli* [1998] Crim LR 584."

[20] In support of his argument counsel for the applicant pointed to a number of passages in the transcript of Dr Browne's evidence in which he submitted that the judge had transgressed these principles. He asked very few questions during his examination in chief, and it could not be said that he had in any way taken the questioning out of the hands of the applicant's counsel. One passage at pages 33-6 was relied upon, together with a number of passages in the cross-examination, as constituting hostile and unfair questioning.

[21] We have studied each of these passages minutely and we have read straight through Dr Browne's evidence from beginning to end, in order to obtain its flavour as a whole. We are quite satisfied that the allegation of unfairness is unfounded. The number and length of the judge's interventions are unremarkable and for long stretches he asked no questions at all. In our

judgment the questioning in some of the passages is anodyne and in others it appears clear that he is trying to clarify for himself and the jury the difficult concepts with which the witness was dealing. That is exemplified by one passage at page 158 where he says disarmingly: "I'm just trying to get this straight in my own head. I'm sure you'll get it straight if I keep quiet!" In a couple of passages the judge interjects his own comment about matters put forward by the witness, but we do not consider that these were sufficiently assertive to affect the jury's capacity to form its own judgment. Finally, in some places he pursues the witness for a direct answer to a question, which he did not always receive without such pursuit, and might possibly be described as having lost some patience with him. Again, we do not consider that these were outside the parameters of the normal and fair conduct of a trial. In addition to analysing and weighing up these passages we have read through the transcript of Dr Browne's evidence as a whole, in order to form our own judgment whether the judge's interventions undermined it or had the effect of imposing his own views improperly upon the jury. In our judgment they did not. We are of course conscious that we have to determine the matter from a transcript, and counsel made the point that the atmosphere in court and the judge's demeanour towards a witness may be much more adverse to the witness and his evidence than appears in cold print. Making all reasonable allowance for this factor, we are nevertheless quite satisfied that the attack on the fairness of the judge's conduct of the trial is without foundation.

[22] We can dispose quite shortly of the suggestion that it was wrong of prosecuting counsel to attack Dr Browne's conclusions when they had in their possession a report which they had obtained from another consultant psychiatrist Dr Fleming, in which the latter expressed his agreement with Dr Browne. Dr Fleming had given evidence in the first trial of the applicant and then furnished a report dated 15 October 2001 by way of comment on the report made by Dr Browne, who had not been instructed at the first trial. Although he was in agreement with the conclusions set out in Dr Browne's report, he did express some reservations and correctly pointed out that the diagnosis was made retrospectively and dependent on the applicant giving an honest account of matters prior to the offence and of his symptoms. The defence declined to allow a psychiatric examination to be held on behalf of the prosecution. The prosecution decided that they would not call Dr Fleming, but gave a copy of his report to the defence and had him available in court so that he could be called on behalf of the applicant if his advisers chose.

[23] In these circumstances we do not see anything unfair or improper in the way in which prosecuting counsel cross-examined Dr Browne. In the first place, Dr Fleming had pointed out a central weakness in his evidence which formed the subject of much of the cross-examination. Secondly, and more fundamentally, the prosecution were not bound to accept the view expressed by Dr Fleming just because they had consulted him. If that view might assist

the defence, it was their duty to inform the defendant's advisers and allow them to call Dr Fleming if they chose, and they fulfilled this duty properly. Having done so, they were in our opinion at liberty to challenge Dr Browne's conclusions, even though Dr Fleming had expressed agreement with them.

[24] The grounds of challenge to the judge's charge to the jury may be summarised under three heads:

(a) he used emotive language and invited the jury to speculate to an undesirable extent about the events which took place;

(b) he misdirected the jury about the applicant's intent;

(c) he misdirected the jury concerning diminished responsibility.

[25] In the course of the first part of his charge, which he gave on 24 October 2001, the judge set out such facts as were established about the course of the applicant's attack on Zara. He stated that the only person who could tell the jury what happened was the applicant and he had given an account, but was unable to remember a large part of the course of the incident. Against that can be set what was found on examination of the scene, which he described as "silent testimony". He went on to attempt to construct for the jury possible ways in which the sequence of events may have progressed, suggesting inferences which might be drawn from the facts known. In so doing he used such phrases as "make this little journey of the imagination with me" and "So can we fill in the gap a little more?", to which the applicant's counsel took exception.

[26] In the course of his charge on the first day the judge did remind the jury (page 51) that the Crown had accepted that the applicant had not arrived at the house with the intention of killing or inflicting grievous bodily harm on Zara. One conclusion which could have been drawn, however, from what he said to them about drawing inferences from the physical evidence was that he did have such an intention all along. He clearly reflected overnight on what he had said the previous day and returned to the topic with the jury at the outset when continuing his charge next morning. He told them that he had not appreciated the full significance of the Crown's concession. He made it clear that it was not in dispute that the applicant did not intend to do Zara any injury when he arrived and that it was only the discussion or confrontation which triggered the attack. He also directed them to put out of their minds any suggestion to which his previous treatment of the facts might have given rise that the applicant pursued Zara downstairs with the intention of attacking her.

[27] The judge went on to give the jury a warning against speculating about what had taken place and stated that it was very difficult to get any solid

evidence about what had happened at different stages of the affair. He ended by directing them to view events in light of the fact that the prosecution accepted that when the applicant went into the house he meant Zara no harm.

[28] Counsel for the applicant contended that the damage was done in the first part of the charge and that the judge's correction was too little, too late. He further submitted that the language used by the judge was so emotive that it tended to prejudice the jury against the applicant and made the trial unfair. We cannot accept either of these propositions. All judges have their own manner of expressing themselves and sometimes spirited language or colourful expressions may be quite justified to catch and keep the jury's attention or implant an important fact or concept in their minds. We do not consider that the judge's language or his choice of phraseology went outside normal and proper bounds. He appreciated that his discussion of possible inferences, which counsel castigated as speculation, was possibly inconsistent with the view of the facts accepted by the Crown. His correction was made at an important time, at the beginning of the second day of his charge, and in a manner designed to impress his words on the jury. In these circumstances we consider that if he had fallen into error on the first day, he made a sufficiently clear correction the next morning and that the jury would not have been misled into drawing unjustified conclusions from the facts which he had earlier rehearsed with them.

[29] **I**t was the responsibility of the judge to convey to the jury that for the applicant to be found guilty of murder it was necessary for them to be satisfied beyond reasonable doubt that he was capable of forming and had formed an intent to kill Zara or inflict grievous bodily harm upon her. The applicant's counsel submitted that the charge did not make this sufficiently clear.

[30] At page 51 of his charge the judge told the jury in classic terms that it was a necessary ingredient of the crime of murder that the accused had the intent to kill or to cause really serious injury. He went on to point out that one defence raised was that the applicant, as he had averred to the police, had no intention of hurting his wife. He stated that the effect of alcohol could be that a person is incapable of forming an intent at all. He went on to say at pages 52-3:

> "But drunkenness is of itself no defence, and a large, having a large quantity of drink is no defence on this issue of intent. The drink would have to be – the amount of drink would have to be such that it obliterated the understanding of the nature of the act and it is entirely a matter for you, members of the jury, to decide whether in this case this man knew enough – you will remember the

> doctor's evidence, he must have had some idea, as it were, he must have had some awareness of what he was doing. Well that would be, some awareness would be quite enough in the eyes of the law, as far as intent is concerned. If you knew what you were doing, I mean, he didn't think he was attacking – defending himself against an intruder, he didn't think that he wasn't using a knife, it seems, and you've got to deal with it, therefore, on the basis of what do his actions tell us? What do the words that he used, while he was carrying out those actions tell us about what he intended to do?"

He further stated at page 53 that –

> "Now, it doesn't matter if he'd so much drink that he'd no control over himself, that he'd lost all control. It doesn't matter that he had too much drink that he was confused. It doesn't matter that he'd so much drink that he was more easily angry. As far as this aspect of the case is concerned, if he had a basic understanding of what he was doing, and if what he intended to do with that knife was to really seriously hurt his wife, and as a result of attacking her in that way he caused her death, then the intent would be there."

[31] Counsel for the applicant submitted that the charge was deficient in two respects on this issue, first, that there should have been a special direction as to foresight of consequences on the lines of that discussed in *R v Woollin* [1999] 1 AC 82 and the preceding line of cases, and, secondly, that the judge's reference to "some awareness" of what he was doing was a misdirection. We do not consider that a special direction was required in this case. Such a direction is only necessary in exceptional cases, and such cases generally centre round an averment by the accused that he had no idea that his acts, although deliberately committed, would cause any death or grievous bodily harm. It was not in our view required in the present case. The judge gave a proper direction on intent in the simple form. He then supplemented it when he recalled the jury after receiving requisitions by directing them that foresight of consequences of itself was only evidence of the existence of the intent. These directions were in our judgment quite sufficient and appropriate.

[32] The applicant did not attempt to make the case that he did not appreciate that stabbing Zara over 30 times would cause her grievous bodily

harm. His averment that he had no intention of hurting her could only mean that he was incapable of forming any specific intent, presumably because of his alcoholic intake. The judge directed the jury with sufficient clarity on the issue of the applicant's capacity to form an intention. It is readily apparent that in his reference to "some awareness of what he was doing", taken in its context, he was dealing with the presence or absence of intent and not the ingredients of the specific intent to be proved to found a charge of murder. As such it was not in any respect a misdirection.

[33] It was submitted on behalf of the applicant that the judge's directions on diminished responsibility did not amount to a proper explanation, in particular the section on the meaning of "substantially impaired". The judge twice read out to the jury the wording of section 5(1) of the Criminal Justice Act (Northern Ireland) 1966:

> "5.-(1) Where a person charged with murder has killed or was a party to the killing of another, and it appears to the jury that he was suffering from mental abnormality which substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing, the jury shall find him not guilty of murder but shall find him guilty (whether as principal or accessory) of manslaughter."

He then went through the authoritative interpretation of the phrase "abnormality of mind" given in *R v Byrne* [1960] 2 QB 396, which is set out in a series of propositions in *Archbold,* 2002 ed, para 19-68. He directed their attention particularly to abnormality constituted by the inability to exercise will-power to control physical acts, the head of the condition most apposite to the present case. We consider that this part of his charge was an entirely clear exposition of the law and its application to the facts of the case.

[34] Counsel then criticised the fact that the judge did not give any direction to the jury on the meaning of "substantially". He did, however, tell them to approach the matter in a broad, commonsense way. Counsel pointed to the trial judge's direction which the Court of Appeal approved in *R v Lloyd* [1967] 1 QB 175:

> " … your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to

> you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?"

This may well be helpful to juries, though we would be far from saying that it is an essential direction, since "substantially" is an ordinary English word, containing a concept which does not require much, if any, further elucidation. In *R v Egan* [1992] 4 All ER 470 at 476 the Court of Appeal regarded either of the directions as acceptable, that the jury should approach the matter in a broad, commonsense way or that "substantial" does not mean either total or trivial. It went on at page 480 to advise judges that guidance as to the meaning of "substantial" should be explicitly provided for the jury by using one or other of the two meanings in *R v Lloyd.* Accordingly, this authority reinforces our own conclusion, that a direction such as that given by the judge in the present case is sufficient.

[35] In order to give proper consideration to the contention that the judge's charge "lacked the cohesion, balance, clarity and direction necessary to a fair trial" we have read straight through his directions to the jury and formed our own assessment of them. We are satisfied that the charge was fairly balanced, gave the necessary guidance to the jury on all the issues and put the defence case properly before them. If there were imperfections, they were not sufficient, taken singly or cumulatively, to cause us concern about the overall fairness and balance of the charge.

[36] The final issue is that contained in ground 5 of the grounds of appeal, that the verdict was unsafe and against the weight of evidence. If, as the Crown accepted, the applicant did not arrive at the house with the intention of injuring his wife, something must have occurred to trigger his murderous attack on her. The defence suggested that this was likely to have been an act or statement on her part which had the effect of provoking him, and the applicant's evidence was that she would not discuss with him his request to stay, then attempted to attack him with a knife. The jury were entitled, however, to reach the conclusion that even if she did so act and that there was a degree of possible provocation, the applicant's reaction went beyond the limits permissible to a reasonable man with the characteristics of the applicant and that his loss of self-control could not be excused by any such provocation.

[37] The main thrust of the submissions of counsel for the applicant on this part of the case was in respect of the defence of diminished responsibility. The burden of their argument was that with Dr Browne's uncontradicted medical evidence before them the jury should not have rejected the proposition that diminished responsibility had been proved on the balance of probabilities. As against that, they were entitled to take into account the fact that the validity of Dr Browne's conclusions depended to a large extent on the reliability of what the applicant himself told him. Moreover, he did not see

the applicant until some three years after the incident, which, as he admitted, placed him at a "very significant and severe disadvantage", and he accepted that the data from which he was working was "less reliable than he would like". The applicant had in the past seen a doctor with complaints of stress and depression, but not since 1997, and had never seen a psychiatrist. He had declined to be examined by a psychiatrist when the prosecution so requested.

[38] In the course of his examination the applicant denied that he had had major problems with his temper over the years, though Dr Browne pointed out to him that his medical records seemed to indicate the contrary and said in evidence that the applicant had agreed with that (transcript pages 167-8). He did say to Dr Browne, however, that his control of his temper had improved since earlier (page 168). In the course of his examination in chief he gave the evidence about his ability to control his temper and walk away from confrontations which we earlier set out. The Crown placed some reliance on this evidence as tending to show that Dr Browne's opinion was not based on solid material and that the jury should discount it. We consider that the jury were entitled to take these matters into account in determining the degree of impairment of the applicant's mental responsibility. Even if they should have been slow to refuse to accept Dr Browne's medical assessment of his mental state, it was for them to determine in a broad, commonsense way whether his responsibility was substantially impaired. On the evidence in the case we consider that they were quite entitled to conclude that it was not.

[39] For the reasons which we have given we do not consider that the applicant has made out any of the grounds on which he attacked the validity of his conviction, and we refuse leave to appeal against conviction. We shall defer until a future date his application for leave to appeal against sentence.